APPENDIX A

Decision of Court Below

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

HARRISONBURG DIVISION

HARRISONBURG, VIRGINIA

Civil Action No. 68-C-13-H

ROBERT P. BURRUSS, VIRGINIA R. BURRUS, JAMES C. TENNANT, JAMES L. TENNANT, *et al.*,

—v.—

WOODROW W. WILKERSON, STATE BOARD OF EDUCATION, *et al.*

(Argued April 25, 1969 Decided May 23, 1969)

Before Bryan, Circuit Judge, and Dalton and MacKenzie, District Judges.

Erwin S. Solomon, Hot Springs, Virginia, Commonwealth Attorney, Bath County, Virginia, for plaintiffs.

Robert Y. Button, Attorney General of Virginia, Richard N. Harris, Assistant Attorney General, and John S. Davenport, III, who argued the case for defendants, and Henry Wickham, all of Richmond, Virginia, for defendants.

Albert V. Bryan, Circuit Judge:

Constitutional invalidity is laid in this suit to Virginia's statute[1] establishing the scheme for distribution of the funds she provides for public education. Bath County suffers discrimination from the operation of this Act of the General Assembly, allege the plaintiffs as resident parents and school children, as well as property owners, there. Defendants are for the most part State officials whose functions and duties touch the disbursement of these moneys.

The grievance pressed and the remedy sought are typified by these paragraphs of the complaint:

> "14. The Act, and particularly its formulae for the apportionment of State Funds among the several counties and cities of the State, creates and perpetuates substantial disparities in the educational opportunities available in the different counties and cities of the State, denies children attending public schools of the County, including Plaintiff Children, educational opportunities substantially equal to those enjoyed by children attending public schools in many other districts of the State, and is thereby repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America, in the following respects:
>
> "14.1. The Act, and particularly its formulae for the apportionment of State Funds, utterly fails in any

[1] Appropriation Act of 1968-70, Acts of Assembly, 1968, chapter 806, item 564.

manner or to any extent whatsoever either (i) to relate to any of the variety of educational needs of the several counties and cities of the State of Virginia—much less weigh the relative acuteness of these needs or provide any sort of balanced response to them, or (ii) to take into account any factors which would tend to equalize the educational opportunities made available in public schools in different parts of the State.

* * * * *

"14.3. The Act, and particularly its formulae for the apportionment of State Funds, fails to take into account in any manner whatsoever, or to compensate to any extent for, substantial differences in the levels of school construction costs, salaries of teachers, administrators and other public schools employees and other expenses of public elementary and secondary education which prevail in different areas of the State of Virginia.

* * * * *

"A. That this Honorable Court enter its judgment declaring the Act, and particularly its formulae for the apportionment of monies appropriated from the School Fund among the several counties and cities of the Commonwealth of Virginia, void and without force or effect as repugnant to the fundamental law of the United States as set forth in the equal protection clause of the Fourteenth Amendment to the Constitution."

Reliance is put first on section 129 of the Constitution of Virginia: "The General Assembly shall establish and

maintain an efficient system of public free schools throughout the State". Plaintiffs' contention is that the Act in suit fails to meet this obligation. This, they say, is primarily demonstrated by the marked deficiencies of the Bath County School physical and instructional facilities, when compared with those of the other political subdivisions in Virginia. These differences, it is urged, evidence an inequality of treatment—want of equal protection of the laws—of Bath County.

The existence of such deficiencies and differences is forcefully put by plaintiffs' counsel. They are not and cannot be gainsaid. But we do not believe they are creatures of discrimination by the State. Our reexamination of the Act confirms that the cities and counties receive State funds under a uniform and consistent plan. With this conclusion we resolve the chief issue of the case, and exposition of the method of computation is not necessary. For the particulars of the calculation, we rely upon the explanation contained in the opinion of the court in Shepheard v. Godwin, 280 FS 869, 872 (E.D.Va. 1968), with the qualification that no longer are Federal impact funds, there mentioned, considered in the apportionments.

Truth is, the inequalities suffered by the school children of Bath are due to the inability of the county to obtain, locally, the moneys needed to be added to the State contribution to raise the educational provision to the level of that of some of the other counties or cities. The blame cannot be placed on the people or the officials or the county. Rather it is ascribable solely to the absence of taxable values sufficient to produce the required moneys. The tax rate and the appropriations have been strained to afford the children better schools.

Actually, the plaintiffs seek to obtain allocations of State funds among the cities and counties so that the pupils in each of them will enjoy the same educational opportunities. This is certainly a worthy aim, commendable beyond measure. However, the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State. We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here.

Our conclusions here are supported by the decision of the 3-judge Federal District Court in McInnis v. Shapiro, 293 FS 327 (N.D. Ill. 1968), aff'd sub nom. McInnis v. Ogilvie, 37 Law Week 3350, —— US —— (March 25, 1969). The circumstances of that case are scarcely distinguishable from the facts here, Virginia's division of school funds closely paralleling Illinois'.

While we must and do deny the plaintiffs' suit, we must notice their beseeming, earnest and justified appeal for help. Virginia, we are told, is studying the school conditions in Bath and other counties confronted with similar inequalities. The General Assembly undoubtedly will come to their relief.

An order will be entered dismissing this action.

301 F.Supp. 1237

Opinion of Ted Dalton, U.S.D.J.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

HARRISONBURG DIVISION

HARRISONBURG, VIRGINIA

Civil Action Number 68-C-13-H

ROBERT P. BURRUSS, *et al.*

—v.—

WOODROW W. WILKERSON, Superintendent of Public Instruction, *et al.*

The plaintiffs, school-aged children and residents of Bath County, Virginia, have invoked the jurisdiction of this court under the provisions of 28 USC §1343(3) and 42 USC §§1983, 1988, seeking a declaratory judgment to the effect that the Virginia Basic State School Aid Fund Act, under which state funds are apportioned to local school districts, is unconstitutional under the equal protection clause of the Fourteenth Amendment and Section 129 of the Virginia Constitution. The gist of their argument is that the apportionment formula works to the disadvantage of the relatively poor rural counties, and thereby denies

the plaintiffs an educational opportunity comparable to that enjoyed by residents of most other Virginia school districts. Plaintiffs also request that this court enjoin the defendants from the further execution of their duties under the Act.

The defendants have filed a motion to dismiss the action for the reasons that the complaint fails to state a claim upon which relief can be granted, that this court lacks jurisdiction of the subject matter and of the parties, and that the relief requested in the complaint may only be granted by a three-judge court under the provisions of 28 USC §2281 and §2284.

This court is of the opinion that the Eleventh Amendment does not prevent a federal court from entertaining suits against state officials to enjoin them from invading constitutional rights. *Ex Parte Young*, 209 U.S. 123 (1908); *Griffin* v. *School Board*, 377 U.S. 218, 228 (1964). Relief might be obtained for the plaintiffs by means of an injunction without requiring the state to take any affirmative action. *James* v. *Almond*, 170 F.Supp. 331, 341 (E.D. Va. 1959); see *Reynolds* v. *Sims*, 377 U.S. 533, 586-7 (1964).

Federal courts clearly have jurisdiction of the subject matter of this complaint under 28 USC §1343(3) and the Civil Rights Act, 42 USC §1983. See *Baker* v. *Carr*, 369 U.S. 186, 198-201 (1962).

Where the relief requested by the complaint may only be granted by a three-judge court under 28 USC §§2281, 2284, the fact that the plaintiffs did not request such a court does not justify dismissing the complaint. This court, and not the plaintiffs, has the duty of determining the need for a three-judge court, and of requesting that it be convened. *Bell* v. *Waterfront Commission*, 279 F.2d 853 (2nd Cir. 1960).

If the complaint presents a substantial constitutional question, this court cannot dismiss it, but must request the Chief Judge of the Court of Appeals to convene a three-judge court. *Aaron* v. *Cooper*, 261 F.2d 97 (8th Cir. 1958). The duty of initially determining whether a substantial federal question is presented lies with this court. *Ex Parte Poresky*, 290 U.S. 30 (1933); *Jacobs* v. *Tawes*, 250 F.2d 611 (4th Cir. 1957).

Ex Parte Poresky, supra, restated the test of whether a substantial constitutional question exists, to wit, the question is insubstantial if it is "obviously without merit" or if the question is foreclosed by previous decisions of the Supreme Court. 290 U.S. at 32. In applying this test, we look no further than the well-pleaded facts alleged in the complaint. *Mosher* v. *Phoenix*, 287 U.S. 29 (1932).

Viewing legal precedents in a light most favorable to the complainants, we find no Supreme Court decisions which foreclose the question here presented. On the contrary, we find several decisions which lend substance to the complaint, and the relevant legal principles may be summarized as follows.

The right to an equal educational opportunity was clearly recognized in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). While racial discrimination is not an issue in this proceeding, at least one recent interpretation of this right to an equal educational opportunity suggests that the right protects individuals not only from discrimination on the basis of race, but also on the basis of poverty. *Hobson* v. *Hansen*, 269 F.Supp. 401, 497 (D.C. D.C. 1967). Poverty does appear to be a factor contributing to the conditions which give rise to the plaintiffs' complaint. It is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination, and that

the discrimination on the part of state officials need not be intentional to be condemned under the equal protection clause. See *Griffin* v. *Illinois*, 351 U.S. 12 (1955) (free appellate transcripts for indigents); *Douglas* v. *California*, 372 U.S. 353 (1963) (free appellate counsel for indigents); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (Virginia poll tax invalidated). The rationale of these decisions appears to be that state policies imposing conditions on the exercise of basic rights, which conditions operate harshly upon the poor, must be clearly justified in order to be constitutionally permissible. Whether the plaintiffs can establish facts which would bring their plight within the ambit of the *Griffin-Douglas-Harper* reasoning would appear to be a question for determination by a three-judge court.

We recognize that the complaint raises questions about whether a federal court should abstain from deciding the federal questions involved in order to permit the state courts to pass judgment on the questions of state law. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). However, this exercise of equitable discretion is likewise committed to the determination of a three-judge court. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962).

Since we are unable to say with certainty that the constitutional issues presented are wholly without merit, the defendants' motion to dismiss is overruled, and this court being of the opinion that a three-judge court as prescribed in 28 USC §2284 should be convened to consider this action, it is Ordered that such procedure be adopted, and this court will forthwith request Chief Judge Clement F. Haynsworth, Jr., of the Court of Appeals for the Fourth Circuit to convene such a court.

The Clerk is directed to send a copy of this opinion to counsel of record.

/s/ Ten. Dalton
U. S. Chief District Judge
November 16, 1968

A True Copy. Teste:

Leigh B. Hanes, Jr., Clerk

By: s/ Daisy H. Nailen
Deputy Clerk

APPENDIX B

Chapter 806 of the Acts of Assembly of Virginia, 1968

	First Year	Second Year
Item 355		
Reimbursement to localities of sixty percent (60%) of the salary cost for local guidance counselors on the basis of the minimum salary schedule	$ 2,012,000	$ 2,120,000
Item 356		
Reimbursement to localities of sixty percent (60%) of the salary cost for local guidance counselors on the basis of the minimum salary schedule, from special revenues received for the purpose from the Federal government $400,000 the first year, $400,000 the second year.		
Item 357		
Reimbursement to localities of sixty percent (60%) of the salary cost for local supervisors and directors of instruction in elementary and high schools, including visiting teachers	$ 1,479,360	$ 1,545,600
Item 358		
State aid to localities for special education	$ 5,802,000	$ 6,150,750
This appropriation includes $4,874,000 the first year, and $5,090,000 the		

First Year Second Year

several sum for reimbursement to localities of sixty percent (60%) of the salary cost of special education teachers, on the basis of the minimum salary scale.

From this appropriation, the State Board of Education may, under its rules and regulations, expend an amount not to exceed $100,000 each year to provide for the education of children handicapped because of aphasia and for children who are otherwise severely handicapped.

Item 360

Reimbursement to localities of sixty per cent (60%) of the salary cost for employing principals during two summer months on the basis of minimum salary schedule.

Item 361

Schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned and distributed to each School Board in this State on a basis of school population, the number of children between the ages of seven and twenty years in each school district

	First Year	Second Year

	First Year	Second Year
564		
school and blind	$171,248,115	$195,309,225

In the apportionment of the sums in this item, the sums which have been or will be received by the respective localities under Items 562 and 563 shall be considered as if they had been received under this item. The total of these sums shall be apportioned to the public schools by the State Board of Education under rules and regulations promulgated by it to effect all of the following provisions stated herein.

a. Apportionment.

1. Subject to the conditions and definitions stated below, each locality shall receive:

a) a State basic share equal to sixty per cent (60%) of the minimum salary cost.

b) a State supplementary share equal to the amount by which the minimum program cost exceeds the sum of the basic State share and the local share.

b. Definitions applicable to State Board of Education items.

1. "Average daily attendance" the average daily attendance for

	First Year	Second Year

the first seven (7) months (or equivalent period) of the school year in which funds are distributed.

2. "State aid teaching position" one teaching position for each thirty (30) pupils in average daily attendance in the elementary grades and one teaching position for each twenty three (23) pupils in average daily attendance in the high school grades.

3. "Minimum salary schedule" the salary schedule for teachers and other instructional personnel approved by the State Board of Education and the Governor.

4. "Minimum salary cost" the cost of salaries paid teachers in State aid teaching positions in accordance with the minimum salary schedule.

5. "Minimum program cost" minimum salary cost plus one hundred and ten Dollars ($110) per pupil in average daily attendance during the first year, and plus one hundred and th

	First Year	Second Year
teen dollars ($1150) per pupil in average daily attendance during the second year.		
6. "Local share" an amount equivalent to a uniform tax levy of sixty cents (60¢) per one hundred dollars ($100) of true value of local taxable real estate and a public service corporation property within a county or city. The true valuation used for this purpose shall be that determined by the State Department of Taxation for the tax year 1966.		
C. Conditions:		
1. Each locality shall put into effect the minimum salary schedule.		
2. Each locality shall provide from local resources not less than thirty per cent (30%) of its total expenditures (exclusive of capital outlay and debt service) for school operation. It is provided that local funds required by this section shall be construed to include the proceeds of any sales tax collected by the State and returned to the localities.		

	First Year	Second Year
3. No apportionment from this item shall be made to any locality for State aid teaching positions in excess of the number of such positions in which teachers are actually employed; provided, however, that in exceptional circumstances and in the discretion of the State Board of Education, a locality may employ fewer teachers than the number of assigned State aid teaching positions, as defined herein.		
4. No apportionment from this item shall be made to any locality for a State aid teaching position in the kindergarten program unless the occupant of the position meets such requirements as may be stipulated by the State Board of Education.		
5. If any municipality annexes any portion of any county or counties, the State Board of Education shall make such equitable adjustment of the funds which they otherwise would have received as it deems justified by the changes resulting from the annexation. This pro-		

	First Year	Second Year

vision shall not apply if a court of competent jurisdiction makes the adjustment.

6. Allotments of funds from this item shall be paid to a locality only after submission of evidence satisfactory to the State Board of Education that the amount for which the allotment is claimed has been or will be expended for the purpose designated and in full compliance with the terms and conditions set forth pursuant to this item.

7. The State Board of Education, with the prior written approval of the Governor, may adjust the distribution of this fund when there is a substantial loss in average daily attendance of pupils in any locality. The average daily attendance data for the locality for the previous year may be used in making this adjustment.

8. The State Board of Education may, in its discretion, apply eligibility requirements and compute allocations from this fund separately for any town

	First Year	Second Year
school district operated by a school board of not more than five members, and the county in which such town is located.		
Item 564.1		
Basic school aid fund guarantee	$ 579,895	$ 88,345

This appropriation shall be added to that in Item 564, if required, in order to assure that during each year of the current Biennium each locality shall receive from Items 562, 563, and 564 an amount at least equal to the amount it received in the year ending June 30, 1968, from the application of Item 459 of Chapter 719, Acts of Assembly of 1966; provided, however, that if a locality has a lower number of pupils in average daily attendance during the current biennium than in the 1967-68 school year, the amount it shall receive under this paragraph shall be adjusted on the basis of the lower number.

* * * * *